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No. 86-1143

In the Supreme Court of the United States

OCTOBER TERM, 1986

NABOR ORTEGA AND AURELIO GONZALEZ, ETC., PETITIONERS

v.

BILL M. ROWE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the temporary detention of suspected illegal aliens pending further processing or deportation violated their Fifth Amendment due process rights when substandard conditions present in the detention facilities, if any, were caused by the negligence of government officials responsible for the facilities.

2. Whether the court of appeals correctly held that respondents did not act with "deliberate indifference" to the needs of detained aliens.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 796 F.2d 765. The opinion of the district court (Pet. App. 9a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1986. A petition for rehearing was denied on October 14, 1986 (Pet. App. 34a-35a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners represent a class of illegal aliens and suspected illegal aliens temporarily held pending further processing or deportation in detention facilities by the Lubbock Station of the United States Border Patrol of the Immigration and Naturalization Service (INS). The detention facilities are owned by cities and counties within the

jurisdiction of the Lubbock Station, which has contracted for their use. Petitioners allege that the conditions of the detention facilities were substandard and, on that basis, they seek damages and injunctive relief[1] from two INS officials (in their individual and official capacities), the INS, the United States, and the City of Lubbock and its mayor, for allegedly violating petitioners' due process rights under the Fifth and Fourteenth Amendments. Pet. App. 9a-11a.

2. Following trial, the district court dismissed petitioners' complaint (Pet. App. 9a-33a). Applying the test set forth in this Court's decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), for determining whether pretrial detention violates a detainee's rights under the Due Process Clause, the court rejected the constitutional claims of the two named members of the class, Nabor Ortega and Aurelio Gonzalez, who were apprehended as they attempted to enter this country illegally and who were subsequently detained by the INS pending further processing or deportation (Pet. App. 28a-31a). The court found that both illegal aliens were detained "for a very short period of time, and the conditions of their confinement, though mildly unpleasant, were not so overcrowded, uncomfortable, or unclean as to rise to a constitutional deprivation" (*id.* at 30a). The court rejected (*id.* at 11a-13a) the claims of Ortega and Gonzalez that they were injured by their detention and expressly found that their detention caused neither any physical nor any emotional injury. Ortega and Gonzalez were in custody in the Lubbock City Jail for 24 and 31 hours, respectively (*ibid.*).

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[1]Petitioners do not, however, challenge the current conditions of the detention facilities used by the Lubbock Station (see Pet. 2). Pursuant to detailed guidelines issued by the INS in late 1982, the facilities now used by the INS at the Lubbock Station and nationwide meet established standards pertaining to supervision, safety, emergency food service, and emergency medical care (Pet. App. 25a-26a). As the district court found (Pet. App. 26a), these guidelines were not established in response to this lawsuit.

The district court next ruled (Pet. App. 30a) that even if the conditions of detention for the two named class members "approach[ed] impermissible punishment, it is clear that they were associated with legitimate governmental goals" and, hence, under *Bell* v. *Wolfish, supra*, the detention did not constitute "punishment" prohibited by the Fifth and Fourteenth Amendments. According to the court (Pet. App. 30a), their detention was an incident of a legitimate government purpose—the need to detain suspected illegal aliens pending their processing by INS in El Paso, Texas—and the conditions of detention did not rise to the level of a deprivation of constitutional rights or constitute punishment "in any degree."

The district court similarly held (Pet. App. 30a-31a) that the claims raised by the unnamed members of the class should be dismissed. The court found (*id.* at 30a) that the conditions of detention were sometimes "unpleasant, but never so totally unacceptable as to offend the Constitution." The court alternatively ruled (*id.* at 31a) that even if the conditions approached impermissible punishment, they did not amount to a constitutional violation because "they were closely related to legitimate governmental interests and were not imposed in an attempt to punish." The court stressed (*ibid.*) that, with one exception not relevant to the claims in this case (see *id.* at 9a n.1, 19a), no detained alien was ever injured or subjected to an unreasonable risk of harm, and there was adequate supervision for those aliens in need of care. The court explicitly rejected testimony on behalf of petitioners that Border Patrol agents or local officials disregarded or ignored petitioners' requests for necessary services and supplies, and that jails were overcrowded for extended periods of time. The court ruled that the weight of credible evidence was to the contrary and the court found that the "agents and officials corrected shortcomings in jail conditions when they learned of any deficiency" and that jails were not overcrowded for more than a

short period of time at most. *Id.* at 17a-23a. The court similarly found that the evidence clearly supported a finding that the agents and local officials "cared for detainee comfort and safety" and "protected [them] from any harm" (*id.* at 17a-18a; see also *id.* at 19a, 22a).

Finally, the court rejected (*id.* at 23a-25a) petitioners' assertion that the Border Patrol deprived them of access to legal counsel. The court found (Pet. App. at 24a-25a) that no alien was denied his right to meet with counsel and while there may have been "slight inconveniences" to lawyers due to the logistics of having only four Border Patrol agents working in an office with a large geographic jurisdiction, there was "absolutely no evidence to suggest a denial or serious infringement by Border Patrol personnel of the detainees' rights to contact and meet with attorneys."

3. The court of appeals affirmed (Pet. App. 1a-8a). Relying on this Court's recent decisions in *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986) and *Davidson* v. *Cannon*, No. 84-6470 (Jan. 21, 1986), the court held (Pet. App. 6a-8a) that petitioners' due process claim should be dismissed because petitioners claimed, and the evidence at trial proved, at most only negligence in failing to inspect the jails regularly. The court found (*ibid.*) that there was no basis in the record for disturbing the district court's factual findings and the court of appeals explicitly rejected claims that the evidence showed that respondents knew of petitioners' discomfort, or acted in either reckless disregard of or "willful indifference" to the conditions of detention. According to the court (*id.* at 7a-8a & n.4), any shortfalls in respondents' maintenance of the detention facilities were simply caused by "confusion" and "a sloppy system of cooperation between federal and local authorities, * * * [which] is not the kind [of conduct] proscribed by the due process clauses of the fifth and fourteenth amendments" (*id.* at 8a (footnote omitted)).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with any decision of any other court of appeals or of this Court. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Pet. 9-18) that the court of appeals misapplied this Court's decisions in *Daniels* v. *Williams, supra*, and *Davidson* v. *Cannon, supra*, in dismissing petitioners' due process claim. The court of appeals, however, correctly applied both those decisions, and petitioners' attempt to distinguish those decisions from the circumstances of this case fails.

In *Daniels*, this Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property" (slip op. 1 (emphasis in original)). Accordingly, in both *Daniels* and *Davidson*, the Court ruled that an injury, even serious, to a prisoner caused by lack of due care by prison officials is not enough to trigger the protections of the Due Process Clause. As the court of appeals correctly held in this case (Pet. App. 5a-8a), *Daniels* and *Davidson* require dismissal of petitioners' due process claims because they rest, like the claims in *Daniels* and *Davidson*, on allegations that respondents acted negligently in maintaining the Lubbock Station detention facilities.

Petitioners attempt (Pet. 9-18) to distinguish *Daniels* and *Davidson* on the ground that this case involves "injuries caused by negligent government policies." Petitioners argue (*id.* at 10-11) that a negligent "policy," unlike negligent conduct, implicates the Due Process Clause because a policy, unlike conduct, is "deliberate, authorized action of government, regardless of whether the policy is adopted wilfully, negligently, or in good faith." Petitioners' proffered distinction between negligent "conduct" generally and

negligent conduct caused by negligent "policy," however, is wholly illusory. In either case, the immediate cause of the injury is negligent conduct, and *Daniels* and *Davidson* therefore plainly control.

In addition, whether the cause of the condition of the detention facilities is labelled government "policy" or government "conduct," the considerations underlying *Daniels* and *Davidson* plainly apply in this case. As both the district court and court of appeals found (Pet. App. 6a-8a, 13a-23a, 28a-31a), the immediate and sole cause of petitioners' injuries, if any, was confusion between local and federal officials concerning their respective responsibilities in maintaining the detention facilities. The officials did not intend to impose substandard conditions on petitioners and acted to alleviate any problems when the officials learned of them. *Ibid.* In these circumstances, the government actions were in no sense "deliberate decisions of government officials to deprive a person of life, liberty or property" (*Daniels*, slip op. 4 (emphasis omitted)) and, hence, as in both *Daniels* and *Davidson*, petitioners' due process claim lacks merit. See *Davidson*, slip op. 3 ("[W]here a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required.").[2]

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[2]Petitioners' reliance (Pet. 12-13) on *Pembaur* v. *City of Cincinnati*, No. 84-1160 (Mar. 25, 1986), *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Owen* v. *City of Independence*, 445 U.S. 622 (1980), is misplaced. In each of those cases, the challenged governmental action was, unlike the actions at issue in this case, deliberate, intentional governmental action: a search authorized by the county prosecutor in *Pembaur*; a state agency's deliberate dismissal, pursuant to a state statute, of an employment discrimination charge in *Logan*; and a municipal officer's dismissal of an employee from public employment in *Owen*. None of those cases raised the issue whether negligent governmental policies provide the basis for a due process violation. Governmental policies were relevant in *Pembaur* and *Owen*, moreover, only in addressing the entirely distinct question whether the municipalities were liable for constitutional violations committed by its

2. Petitioners contend (Pet. 18-20) that the court of appeals' definition of "deliberate indifference" is contrary to this Court's decision in *Davidson*. The court of appeals' decision, however, is completely consistent with *Davidson*, which, petitioners admit (see Pet. 18), did not rule on the meaning of "deliberate indifference" (see *Davidson*, slip op. 3). The gravamen of petitioners' contention that respondents acted with "deliberate indifference" is petitioners' disagreement with the district court's factual findings, which were properly upheld by the court of appeals.

Petitioners claim (Pet. 19) that the record is clear that respondents "knew or should have known of the squalid conditions in the Lubbock jail" and that "[i]f such extraordinary disregard for the lives and safety of those in the government's custody does not amount to deliberate indifference, it is difficult to imagine what would." As stressed by the court of appeals (Pet. App. 6a), however, the district court explicitly found that respondents "lacked any intent to punish the detainees * * * [and] that, in general, 'those [Border Patrol] agents and [local] officials corrected shortcomings in jail conditions when they learned of any deficiency.' " Hence, absent reversal of the district court's findings as "clearly erroneous," petitioners' only remaining claim is that respondents "should have known" that there were problems with the detention facilities, which is itself a classic restatement of a negligence standard. The court of appeals therefore did not err in rejecting petitioners' claim that respondents acted with "deliberate indifference," and

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officials. For this same reason, petitioners' additional claim (Pet. 14-18) that review is warranted to address a "conflict" (perceived by petitioners) between this Court's decisions in *Pembaur* and *Owen* and its decision in *City of Oklahoma* v. *Tuttle*, 471 U.S. 808 (1985), lacks merit. In *Tuttle*, as in *Pembaur* and *Owen*, the only issue raised and addressed by the Court was the liability of a municipality for the unconstitutional acts of its officers.

petitioners' contrary claim raises only factbound issues that do not warrant this Court's review.

3. Petitioners contend (Pet. 20-23) that the court of appeals' decision conflicts with this Court's decision in *Bell* v. *Wolfish*, 441 U.S. at 520 (1979). This contention lacks merit. In *Bell* v. *Wolfish*, 441 U.S. at 535-540, this Court set forth the test for determining whether conditions deliberately imposed by government on detainees were consistent with due process requirements.[3] In *Bell* v. *Wolfish*, however, this Court did not address the distinct issue, raised in this case and answered in *Daniels* and *Davidson*, whether the same constitutional analysis applied to conditions of detention that resulted from mere negligence or inadvertence. The court of appeals therefore properly relied on *Daniels* and *Davidson*, and its decision is not inconsistent with *Bell* v. *Wolfish*.

4. Petitioners' final contention (Pet. 23-25) that the issues raised in this case are important ignores events subsequent to petitioners' initiation of this lawsuit. As described by the district court (see Pet. App. 25a-26a), INS issued detailed guidelines in November 1982 (not in response to this lawsuit (see *id.* at 26a)) regarding operation of detention facilities, including minimum supervision, safety, emergency food service, and emergency medical care requirements. Petitioners do not challenge (see Pet. 2) the current conditions of the detention facilities used by the Lubbock Station, which since 1983 have met specific standards established pursuant to those INS guidelines (see Pet. App. 25a-26a). Petitioners' original request for injunctive relief therefore has been largely superseded by subsequent events,

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[3]The conditions challenged in *Bell* were all deliberately imposed. See 441 U.S. at 525-526 (double bunking); *id.* at 553 (restriction on receipt of packages); *id.* at 555 (unannounced searches); *id.* at 558 (body cavity searches).

and the issues presented by this case, which are rooted in INS policies long since discarded, are not of continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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